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The Supreme Court of the United States
OCTOBER TERM, 1952

No......

JOHN BURNS and LAWRENCE NOLAN
Petitioners

versus

CAROLINA POWER & LIGHT COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, John Burns and Lawrence Nolan, respectfully show as follows:

Summary Statement of the Matter Involved

Your Petitioners, John Burns and Lawrence Nolan, individually, filed suits on February 10, 1949, in the Court of Common Pleas for Darlington County, State of South Carolina, against Carolina Power & Light Company, a non-resident corporation doing business in Darlington County, and J. M. Daley, a resident of

Darlington County and a fellow employee of your petitioners, for the recovery of damages for injuries received by your petitioners. The respective complaints were identical, except as to the name of the plaintiffs, the nature of their injuries, and the amount of damages claimed. Your petitioners alleged joint and concurrent acts of negligence on the part of the two defendants.

In due time the defendant Carolina Power & Light Company removed the cases to the United States District Court for the Eastern District of South Carolina on the grounds of diversity of citizenship, alleging, among other things; that the complaints did not state a joint cause of action against the resident defendant, J. M. Daley, and the Carolina Power & Light Company, and that the complaints did not state a cause of action against the defendant, J. M. Daley.

In due time, motion was made to remand and His Honor, J. Waites Waring, United States District Judge, denied the motion to remand holding that the complaints did not state a "cause of action against Daley, and certainly not one that is joint or concurrent." This was the only ground for denial set forth in his order, which was entered on April 22, 1949. Thus the resident defendant was dismissed from the action and the District Court retained jurisdiction. The two cases were thereafter treated as one. The cases came on for trial against the Carolina Power & Light Company alone. The cases were submitted to the jury and resulted in a mistrial. Thereafter, on June 27, 1951, the Honorable District Judge entered an order directing a verdict in favor of Carolina Power & Light Company.

An appeal was taken to the Circuit Court of Appeals for the Fourth Circuit, and on December 29, 1952, this Court rendered its opinion wherein the Court held that the District Judge had committed error in holding that the complaint did not state a cause of action against the defendant, J. M. Daley. However, the Court affirmed the action of the District Judge by holding that the South Carolina Workmen's Compensation Act bars a suit at common law by an employee against a fellow employee for the latter's negligence. This question had never been decided by a court of the State of South Carolina, or a Federal Court in the State of South Carolina, including the District Court in this case, and the Circuit Court of Appeals for the Fourth Circuit relied upon a decision of the Supreme Court of North Carolina, interpreting a North Carolina statute identical with that of the South Carolina Statute.

Shortly after the opinion was handed down by the Circuit Court of Appeals, one of your petitioners filed a complaint in a lower court in the State of South Carolina against J. M. Daley, seeking a declaratory judgment on the question. The lower court rendered its decision wherein it held that the South Carolina Statute involved did not bar such an action, whereupon your petitioners petitioned the Circuit Court of Appeals for the Fourth Circuit for a rehearing, calling the attention of the Circuit Court of Appeals to the State Court's ruling on the question and praying the Court to grant a rehearing on the question in light of the recent decision by the South Carolina Court.

Jurisdictional Statement

The order of Judge Waring refusing to remand the

case to the State Courts was filed in the United States District Court for the Eastern District of South Carolina, Florence Division, on April 22, 1949, and is officially reported at 88 F. Supp. 676. The appeal to the Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, having been timely filed, was heard at Baltimore, Maryland, and the opinion of that Court was filed on December 29, 1951, and is officially reported at 193 F. (2d) 525. Petition for rehearing being duly filed was denied by the Circuit Court of Appeals on March 1, 1952, and is as yet not officially reported.

The statutory authority under which jurisdiction of this Court is invoked is Title 28, U. S. C. A., Section 1254, and the Supreme Court Rules 38, and cases decided by this Honorable Court thereunder.

The Circuit Court of Appeals has decided a case wherein the Court lacked jurisdiction, or having jurisdiction, the Circuit Court of Appeals has decided an important question of state law in a way in conflict with applicable local decisions.

QUESTION ONE

Should the Circuit Court of Appeals upon finding that the District Court was in error in holding that a complaint filed in a State Court against a resident defendant and a non-resident defendant failed to state a cause of action against the resident defendant, retain jurisdiction to decide a question not passed upon by the District Court in the order appealed from, which question involved the interpretation of a State Statute involving public policy of the State not theretofore decided by any court?

Reasons Relied On For Allowance of Writ

Your petitioners would respectfully show that a finding by a Federal Court, whether it be a District Court or a Circuit Court of Appeals, that a complaint states a cause of action against a resident and a non-resident defendant deprives the Federal Court of jurisdiction and that remand to the State Courts is mandatory. The Circuit Court of Appeals for the Fourth Circuit found that the complaint stated a cause of action against the resident defendant, thus the effect of such a ruling was to hold that a resident defendant and a non-resident defendant were joined as tort feasors in an action originally begun in the State Court. This finding that there was no diversity of citizenship, the ground upon which removal was based, of necessity deprived the Federal Court of jurisdiction, yet in spite of this the Circuit Court retained jurisdiction to decide a question not passed upon by the District Court. The Circuit Court in its opinion said:

> The case was removed to the District Court on the grounds that the complaint did not state a joint cause of action against the resident defendant, J. M. Daley, and Power Company, and did not state a cause of action against the defendant J. M. Daley.

Generally Federal Courts should decline to determinte state law involving provisions of statutes or of constitutions and remit litigants to the state courts for that determination. *Meredith v. City of Winterhaven*, 134 F. (2d) 202, reversed on other grounds, 64 S. Ct. 7, 320 U. S. 228, 88 L. Ed. 9.

Where question upon which case turns is one of state courts and affecting an important state policy, Federal District Court as a court of equity must, in the exercise of a wise discretion, stay its hand provided the situation is such that a definitive determination of the issue of state law may be obtained by the parties through recourse to state courts. *Green v. Phillips Petroleum Co.*, C. C. A. Iowa 1941, 119 F. 2d 466, certiorari denied 62 S. Ct. 72, 314 U. S. 637, 86 L. Ed. 511.

The ruling of the Honorable Circuit Court of Appeals, if allowed to stand, will have a profound effect, not only upon your petitioners, but upon every individual or firm, of which there are literally thousands annually, who seek to have rights adjudicated in the courts of any state by giving the Circuit Court of Appeals a right to decide questions which should properly be decided by the State Courts for the reason that the Federal Courts lack jurisdiction and will in effect repeal that portion of the statute which grants jurisdiction to Federal Courts only in cases where there is diversity of citizenship so as to give the Fed-

eral Courts jurisdiction where there is no statutory authority therefor. The chaos resulting, if such a condition is allowed to stand, is self-evident.

As to your petitioners, they will forever be deprived of a right to recover for serious injuries inflicted upon them by the negligence of the defendants, which injuries will make them and their families dependent upon the public for such existence as they are able to eke out of life, due to the ruling of the Circuit Court that they, your petitioners, cannot get justice according to the law of the land. This ruling deprives your petitioners of their cause of action under state law, which is to the effect that a plaintiff, only, can decide whether or not to sue joint tort feasors, jointly or severally. The ruling of the Circuit Court allows the defendant to decide this, thus depriving your petitioners of their property rights in their cause of action.

QUESTION TWO

Where the interpretation of a State Statute controls the rights of litigants in a case in a Federal Court, can the Circuit Court of Appeals, under Section 1652, Title 28, U. S. C. A., on a petition for rehearing filed while the Court still has jurisdiction, disregard the interpretation placed upon that statute by a State Court, by refusing to weigh, consider or take cognizance of such decision though the Court was informed that such a decision was in effect in the State.

Reasons Relied On for Allowance of Writ

The Circuit Court of Appeals held in its opinion

below that Section 7035-10 of the South Carolina Workmen's Compensation Act bars common law actions by an employee against a fellow employee. In reaching such a decision this court relied upon decisions of the Supreme Court of North Carolina and Virginia, which interpreted statutes of those states which are worded similar to the statute involved. The court in its opinion failed to cite as authority for such a holding any case from the State of South Carolina, in spite of Section 1652, Title 28, U. S. C. A.

Whether or not South Carolina is to allow suits by an employee against a fellow employee is one of great importance to every worker in South Carolina covered by the South Carolina Workmen's Compensation Act. It is a matter concerning the public policy of the State of South Carolina, especially at this time with the present trend of industrial development of the State of South Carolina, where every day additional persons are added to the already large number of industrial workers covered by the South Carolina Workmen's Compensation Act. Yet the Circuit Court of Appeals has decided a question involving the public policy of South Carolina without the benefit of any South Carolina decision which might shed light as to how the South Carolina Supreme Court would decide the question.

Shortly after the opinion of the Circuit Court of Appeals was handed down, one of your petitioners filed suit in the State Courts of South Carolina seeking a declaratory judgment upon this question. The judgment was sought against the resident defendant J. M. Daley. The lower South Carolina court promptly and with expediency handed down its decision wherein it held that Section 7035-10 of the South Caro-

lina Workmen's Compensation Act does not bar such an action, pointing out that such an interpretation would be in derogation of common law, requiring strict construction of the statute against such a holding, and ruling that the statute did not clearly and concisely overrule the common law.

Your petitioners thereupon petitioned the Circuit Court of Appeals seeking a rehearing asking that this Court reconsider its decision in the light of the ruling of the South Carolina Court. Your petitioners sought first to have the Court grant the rehearing and failing in that they asked the Court to delay its decision on the granting of the rehearing until such time as the South Carolina Supreme Court ruled upon the question. Your petitioners informing the Court that the ruling of the lower Court was on appeal to the highest court of South Carolina.

However, the Circuit Court chose to ignore the plea of your petitioners and the ruling of the South Carolina Court and denied the petition for rehearing. Your petitioners submit that it was error for the Circuit Court of Appeals to ignore a ruling by a state court directly contra to its ruling on the same question.

Furthermore there is serious doubt as to whether the Circuit Court reached the correct decision irrespective of their disregard for the ruling by the South Carolina Court. This is evidenced by recent developments in the case for declaratory judgment now on appeal to the South Carolina Supreme Court as hereinabove mentioned. The resident defendant who was dismissed by the Federal District Court had never been before any court until one of your petitioners sought his declaratory judgment on the question here

involved. This judgment was sought against the resident defendant alone yet the respondent here, the Carolina Power & Light Company, has filed with the Supreme Court of South Carolina a petition to appear as *amici curiae* and has filed a brief in support of its position, although there is no such precedent in South Carolina. In this brief the respondent has incorporated the following documents, which constitute part of the record in this case:

Exhibit 1: A copy of the summons and complaint of Lawrence Nolan in the original action instituted against Carolina Power & Light Company and J. M. Daley.

Exhibit 2: A copy of Carolina Power & Light Company's Petition for removal to the United States District Court.

Exhibit 3: A copy of plaintiff's Brief in the Court of Appeals.

Exhibit 4: A copy of plaintiff's Supplemental Brief in the Court of Appeals.

Exhibit 5: A copy of the Carolina Power & Light Company's Brief and Appendix in the Court of Appeals.

Exhibit 6: A copy of the Supplemental Brief of Carolina Power & Light Company in the Court of Appeals.

Exhibit 7: A copy of the plaintiff's Petition to Rehear in the Court of Appeals.

Exhibit 8: A copy of the order of the Court of Appeals denying the Petition to Rehear.

The only reason the respondent could possibly have in filing such a petition and brief with the Supreme

Court of South Carolina is that the Circuit Court has committed error in its holding, otherwise there would be no point in filing anything with the South Carolina Supreme Court.

Your petitioner, Lawrence Nolan, through his attorney's, filed a reply brief in which they set forth reasons why respondent has no standing in the state action and setting forth the true reason why the respondent filed its petition and brief in the state court. However, though sincerely believing that respondent had no standing in the state action, your petitioners nevertheless asked the State Supreme Court to consider the brief of the respondent so that the court might have before it everything which could shed light upon the question presented. The decision of the Supreme Court of South Carolina then will certainly be decisive of the state law on the question now before this court and will enable this court to correct the error made by the Circuit Court of Appeals in the event the State Supreme Court affirms the decision of the lower state court.

Your petitioners therefore feel that the question here to be decided is one involving the public policy of the State of South Carolina and is one which ought to be decided by the only court having the authority to conclusively decide it, and that this Honorable Court ought to grant your petitioners' *Writ of Certiorari* so that the matter may be fully laid before this Court for its consideration of the matter and the determination of the question of whether or not the Circuit Court erred in disregarding local law or in failing to remand the case to the State Court for a decision on a question involving the public policy of the state.

Wherefore, your petitioners pray that a *Writ of Certiorari* issue under the seal of this Court to the Circuit Court of Appeals for the Fourth Circuit, in the case of John Burns and Lawrence Nolan, vs. Carolina Power & Light Company, No. 6329, to the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law, and that upon review, this Honorable Court do issue an order reversing the opinion of the Circuit Court of Appeals for the Fourth Circuit, dated December 29, 1951, and March 1, 1952, and ordering the cause remanded to the State Court from which it was erroneously removed, together with the costs as provided by law.

Respectfully submitted.

JOHN BURNS
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Petitioners

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The Supreme Court of the United States
OCTOBER TERM, 1952

No......

JOHN BURNS and LAWRENCE NOLAN
Petitioners

versus

CAROLINA POWER & LIGHT COMPANY
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinions of the Courts Below

The opinion of the District Court is reported in 88 F. Supp. 767. The opinion of the Circuit Court of Appeals is reported in 193 F. (2d) 525. The opinion denying rehearing is yet not officially reported.

Jurisdiction

Jurisdiction of this Court is invoked under Section 1254, Title 28, U. S. C. A., and revised rules of the Supreme Court, Rule 38.

The court below has decided a case lacking jurisdiction and if not lacking jurisdiction, has decided a case

contrary to the law of the State of South Carolina in contravention of Section 1652, U. S. C. A., Title 28.

Statement of the Case

The statement of the case in the foregoing Petition under the heading Summary Statement of the Matter Involved is herewith adopted.

Specifications of Errors

1. The Court below erred in retaining jurisdiction to decide matters involved not previously ruled upon, after finding in effect that there were no grounds giving Federal Courts jurisdiction.
2. The Court below erred in failing to follow local law in violation of Section 1652, U. S. C. A., Title 28.

ARGUMENT

Question One

The first question presented is whether or not a Federal Court has jurisdiction to decide a case after affirmatively finding that a complaint filed in a State Court stated a cause of action against a resident defendant.

The Complaint in paragraph 2 alleges "that defendant Carolina Power & Light Company is a corporation organized and existing under and by virtue of the laws of the State of North Carolina, as plaintiff is informed and believes."

Paragraph 3 alleges "That defendant J. M. Daley is a resident of Darlington County, South Carolina."

The remaining allegations, among other things, alleges several joint and concurrent acts of negligence on the part of the two named defendants.

The jurisdiction of inferior Federal Courts is such "as Congress may from time to time ordain and establish." Article III, Section 1, United States Constitution. Congress has seen fit to grant jurisdiction to District Courts in several classes of cases, however, the only class with which we are concerned is that commonly referred to as "Diversity of Citizenship" cases for this is the only ground upon which defendant's right to have the case tried in a Federal Court rests. Section 1332(a), Title 28, U. S. C. A. provides that:

> The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> (1) *Citizens of different states.* (Emphasis ours).

Therefore, unless this action is one between citizens of different states the Federal District Court is without jurisdiction.

The Circuit Court held that the complaint stated a cause of action against a resident defendant. Wherein, then is the diversity of citizenship to give the Federal Courts jurisdiction? There is none, therefore the Circuit Court should have remanded the case to the District Court with directions to remand the case to the state. This the Honorable Circuit Court refused to do. This was error.

Under the South Carolina case of *Pendleton v. Co-*

lumbia Railroad Gas & Electric Co., 131 S. E. 265, 133 S. C. 326, the Supreme Court of South Carolina had held, and it is still the law, that where one is injured as the proximate result of separate and independent acts of negligence of two or more parties, the tort feasors, in the absence of community of design or concert of action, are subject to a liability which is both joint and several. And "Since the liability of such tort-feasors is both joint and several, it is well settled that the law gives to the injured party the option of suing two or more of the parties liable jointly." The Court then quoted with approval from the case of *Hough v. Southern Railway Company*, 144 N. C. 692, 695; 57 S. E. 469-471. "The plaintiff, or party aggrieved by the wrong, may make it joint or several at his election; *and* it is not open to the wrongdoer to complain of the election so made, or to dictate how he shall make his choice. If the injured party chooses to sue the wrongdoers jointly, he thereby declares that the tort shall be joint, and the law so regards it, without listening to or even hearing from the wrongdoer."

The complaint alleges joint and concurrent acts of negligence in certain specified particulars. Thus in this case the plaintiffs have characterized their cause of action as being one for joint negligence and the defendant cannot dictate or interfere with this choice. The plaintiff stands or falls by the exercise of his option.

The finding by the Circuit Court that the complaint stated a cause of action then deprived the Federal Court of jurisdiction and lacking jurisdiction the court was without power to further deal with the case.

Furthermore, is not plaintiffs cause of action a prop-

erty right? It is all he has left as the petitioners have been forever deprived of their means of livelihood by the injuries they have received as a result of the negligence of the two defendants.

Has not plaintiff been deprived of his property without due process of law? Due process does not include action by a court without jurisdiction.

Question Two

Where the interpretation of a State Statute controls the rights of litigants in a case in a Federal Court, can the Circuit Court of Appeals, under Section 1652, Title 28, U. S. C. A., on a petition for rehearing filed while the Court still has jurisdiction, disregard the interpretation placed upon that statute by a State Court, by refusing to weigh, consider or take cognizance of such decision though the Court was informed that such a decision was in effect in the State.

The court below erred in failing to follow local law.

Your petitioners submit that the Circuit Court of Appeals was in error in refusing to weigh a decision of a state court, not the highest court of the state, when the highest court of the state had not considered the point in issue.

An interpretation of a state statute was before the honorable Circuit Court of Appeals when the court retained jurisdiction of this case, and the Court, upon being informed on a petition for rehearing that there was a local case which interpreted the statute, refused

to allow your petitioners to present this decision to the court for the court's consideration.

The case of *West v. A. T. & T. Co.*, 311 U. S. 272, 85 L. Ed. 139, states:

> A state is not without law save as its highest court has declared it. There are many rules accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts. See *Erie R. Co. v. Thompkins, supra* (304 U. S. 78, 82 L. Ed. 1194, 58 S. Ct. 817, 114 A. L. R. 1487); *Russell v. Todd, supra* (309 U. S. 293, 84 L. Ed. 762, 60 S. Ct. 527).

The case of *Huss v. Prudential Insurance Company*, 10 F. Supp. 771 states:

> A state is not without law save as its highest court has declared it, and federal court in every case *must* ascertain from all available data what the state law it.

In the case of *American National Ins. Co., of Galveston, Texas v. Belch*, 100 F. (2d) 48, the Circuit Court of Appeals properly granted rehearing where prior decision was based on federal decision under be-

lief that no relevant state statute or decision was available, and relevant decision of state court was subsequently discovered.

The authorities sustaining the above contention are too numerous to attempt to cite here, but petitioners feel that the law on this point is so well established that further ciations are unnecessary. It then follows that the Circuit Court of Appeals should be held in error for refusing to follow a state's interpretation of its own statutes.

As is shown by the record, the Circuit Court of Appeals, in addition to refusing to weigh a decision of the second highest court of the state of South Carolina on the interpretation of a state statute, upon being informed that the interpretation of the statue was on appeal, refused your petitioners' prayer to postpone its final decision until the highest court of the state passed upon the question before it. The court evidenced by this decision its unwillingness to follow or be advised by or even consider the law of the state on the vital issue of the interpretation of a state statute. This position takes on added significance when it is noted that the common law which has long existed and is contra to the holding of the Circuit Court of Appeals remains unchanged unless specifically abrogated by the statute. The Circuit Court of Appeals determined, in the face of the well established proposition of the strictest construction of statutes purported to be in derogation of common law, that the common law and long standing public policy of the state were changed. In this vital issue concerning public policy, the Circuit Court of Appeals refused to weigh the decision of the state court directly on the point involved, and further refused to follow the cer-

tain road to justice by withholding its decision pending determination of the issue by the state's highest court.

Your petitioners submit that the Circuit Court of Appeals has committed error in the particulars above mentioned, and that under the law governing the use of state decisions in the federal courts, and in the interest of justice this court should reverse the decision of the Circuit Court of Appeals below and remand this case to the South Carolina Courts for its proper determination.

Respectfully submitted.

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